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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-254

STATE OF OHIO,

Petitioner,

vs.

JAMES U. RUPPERT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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STATEMENT OF THE CASE

The Respondent agrees substantially with the Statement of the Case except that the Respondent would add the following:

That at the June 6, 1975 hearing referred to by Petitioner's Brief and relevant portions which appear in the end of Petitioner's Brief, it should be noted that the Prosecuting Attorney was present in open Court at the time Judge Cramer advised the Respondent of his rights to a jury trial and at no time did the Prosecuting Attorney make any objection thereto.

It should also be noted that at the June 16, 1975 pretrial conference the Prosecuting Attorney was present in

chambers when the inquiry was made about the unamnimity and again at that time the Prosecutor raised no objection nor made any comment.

It should further be noted that Respondent James U. Ruppert had no knowledge of what had gone on at either the informal conference before the June 6, 1975 waiver of a jury, or the pre-trial conference before commencement of trial on June 16, 1975.

In addition it must be noted that at any time before time of trial the Respondent could have negated his jury waiver.

It should also be noted that the opinion of the First District Court of Appeals found that Fundamental Fairness had been violated in informing Ruppert of the need for unanimity, then convicting him by a simple majority of a three judge panel and finally the Ohio Supreme Court relied on Ohio Criminal Rule 23 in reaching its decision that the jury waiver was not knowing, intelligent and voluntary. (See Appendix A for Ohio Criminal Rule 23).

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

This Court need not determine the validity of the decision by The Court of Appeals First District of Ohio and by The Supreme Court of Ohio for the reason that said considerations were grounded not only on the Constitutional principles but on established Ohio Law and upon the Criminal Rules.

The Petitioner argues that the Court of Appeals and the Supreme Court applies a "per se rule" to invalidate the jury waiver and insists that the two Ohio Courts held under such a "per se rule" that whenever misinformation is given a client by an attorney this will invalidate either the verdict or the jury waiver.

However, neither Court used such a "per se" test to determine whether the jury waiver by the defendant was knowingly, intelligently and voluntarily made, but instead looked in detail at the facts and circumstances surrounding the waiver and found that the defendant could not have given up a known right based on what he was told. As the Court of Appeals stated, which is found in the Appendix of the Petitioner's Brief, the jury waiver was not made knowingly and intelligently and that Respondent only consented to a trial before a panel which had to be unanimous in all guilt findings, but what he actually got was a trial where the majority of the two could find him guilty and was not made aware of that until after the determination of guilt.

The Court concluded that the waiver was not knowing and therefore could not be voluntary and was governed by established principals of fairness.

In addition the Ohio Supreme Court based its holding on Ohio Criminal Rule 23 which is found in Appendix to Respondent's Brief. This Rule basically requires that before commencement of a trial the defendant may knowingly, intelligently and voluntarily waive in writing his right to a jury trial, but such waiver must be knowingly, intelligent and voluntary. It might be noted in addition that in this case both courts found that the waiver was not knowingly, intelligently and voluntarily made on the facts of this case and not on any "per se test".

James Ruppert testified in the Motion for a New Trial that he did not make the decision to waive the jury until the day that he signed the paper and that he was advised by the Court that all three must be unanimous. (See opinion of the First District Court of Appeals). In addition it should again be stressed that at the initial waiver on June 6, 1975 and at the pre-trial conference which took place on June 16, 1975 the Prosecuting Attorney was present.

Thus it is obvious from the circumstances that there was adequate basis for the decision of both the Court of Appeals and the Ohio Supreme Court. In fact both Courts said that the jury waiver was not knowingly, intelligently and voluntarily made because Mr. Ruppert had clearly been given a set of circumstances on which he relied and which later turned out to be false. All cases cited by the Petitioner note that it must be an intelligent choice, i.e., an intentional relinquishment or abandonment of a right or privilege, e.g., *Johnson* v. *Zerbst,* 304 U.S. 458. How could Respondent intentionally have abandon a known right when he was misinformed as to the extent of that right?

Petitioner cites the case of *Adams* v. *U.S. Ex Rel McCann,* 317 U.S. 269 (1943) yet *Adams* is distinguishable

since it is obvious that *Adams* does not deal with the situation in which faulty information is given and in fact *Adams* makes it clear that the waiver must be freely and intelligently made which of course implies that the information given must be correct and that whether or not there is an intelligent, competent waiver of a jury trial depends on the unique circumstances of each case.

Therefore, neither Court formulated a "per se rule" but merely looked at the circumstances of this case and found that the jury waiver was not knowingly, intelligently and voluntarily made.

The Respondent next alludes to an alleged triology of cases in 1970 which he contends were developed to meet the modern reality of universal assistance of counsel. However, all three of these cases, i.e., *Brady* v. *United States,* 397 U.S. 742, *McMann* v. *Richardson,* 397 U.S. 759 and *Parker* v. *North Carolina,* 397 U.S. 790 are distinguishable from the case at hand. In *Brady,* counsel's mistake was thinking the State had a stronger case than it did and in advising the Petitioner to plead in exchange for the State guaranteeing that the death penalty would not be imposed. It should be noted that the Petitioner pled guilty in *Brady* in 1959 and the Death Penalty Statute was not declared unconstitutional until nine years later. At the time of the plea the death penalty was a very real possibility and had it been imposed it is quite likely that the Petitioner would have been dead by the time this Court decided *United States* v. *Jackson,* 390 U.S. 570.

Furthermore, in a guilty plea in *Brady* Petitioner admitted the facts and admitted that he was guilty in exchange for leniency. James Ruppert, however, pled not guilty and waived his right right to a jury trial only on the assurance that the three judge panel must be unanimous.

In *McMann* v. *Richardson,* Supra, the Supreme Court decided that if a coerced confession had an abiding impact and tainted the plea then the plea would be overturned. However, on the specific facts of this case this Court found no such abiding impact and noted that a conviction after a plea of guilty rests on the defendant's own admission in open court that he committed the acts with which he is charged and without such admission there could be no guilty plea.

Once again this is an entirely different situation than that of James Ruppert for the simple reason that the court in *McMann* v. *Richardson,* found that the guilty plea was made voluntarily and found that a coerced confession which was made did not so taint the admission of the defendant who pled guilty that it would require setting the plea aside.

Finally in *Parker, Supra,* the Court found the circumstances dissipated the taint of the coerced confession and that nothing in the record raised any doubts that the defendant's admission of guilt was based on anything other than his actual guilt.

The Petitioner then cites *Tollet* v. *Henderson,* 411 U.S. 258 in which this Court stated that erroneous advice which was peripheral to the normal focus of counsel's inquiry would not invalidate a waiver of trial and a guilty plea otherwise made intelligently and voluntarily. In *Tollet,* supra the defendant sought to overturn the plea on the grounds that the Grand Jury had excluded negroes. The issue was not raised in the State Court at all at the time of the plea and furthermore at the time of the plea of guilty it was apparent that he and his attorney were unaware that negroes had been excluded. The Court said that there was no showing (1) that this had any effect on the validity of the indictment; (2) since it was unknown by the defendant and his attorney it certainly could have had no effect on the decision whether or not to plead guilty.

It must be noted that this Court stated in *Tollet* v. *Henderson* that the erroneous advise must be peripheral to the normal focus of counsel's inquiry. The normal focus of counsel's inquiry may not necessarily include the makeup of the Grand Jury and this Court found that in this case such inquiry was peripheral. However, the decision of whether or not to waive a jury is certainly not peripheral to the normal focus of counsel's inquiry and thus *Tollet* v. *Henderson* is not applicable. This Court did hold in the case of *Henderson* v. *Morgan,* 426 U.S. 637:

> ". . . An assumption that a defendant in a criminal case would have upon the advise of his attorney pled guilty to a charge of second degree murder even if he had been informed that intent to cause his victims death was an element of the offense is an insufficient predicate for conviction on that charge . . ."

This Court further stated:

> ". . . Where the defendant was not advised of this important element he could not plead guilty . . ."

Both the Court of Appeals and The Ohio Supreme Court relied on this case finding that after consideration of all the facts the jury waiver could not have been made knowingly, intelligently and voluntarily particularly relying on *McCarthy* v. *United States,* 394 U.S. 459 and *Boykin* v. *Alabama,* 395 U.S. 238. Various State Courts and Federal Courts have likewise decided the issue of a valid jury waiver. The cases cited above in this Court merely rest upon a plea of guilty which is a different circumstance all together. In a plea of guilty the defendant admits his guilt and admits the facts. However, in waiving a jury he merely waives an important constitutional right, but does not admit his guilt and the distinction is one of importance.

In the case of *State* v. *McCoy,* 26 OApp (2d) 62 the Court of Appeals of Ohio held:

> ". . . Where the defendant did not waive a trial by jury as provided by statute the trial court had no authority to hear and determine the issues even if the facts were stipulated . . ."

In this case the defendant had not waived a trial by jury in writing. The Court found that this fact in and of itself was sufficient error and reversed the case.

Other states are in accord to the fact that a jury waiver must be knowing, intelligent and voluntary, see for example *Baez* v. *Circuit Court of Cook County,* 395 FSupp 1285, *Pennsylvania* v. *Stokes,* 299 A (2d) 272, *Pennsylvania* v. *Hookes,* 301 A (2d) 827, *Pennsylvania* v. *Williams,* 213 A (2d) 597, *Ford* v. *Indiana,* 299 NW (2d) 637, *Williams* v. *Indiana,* 307 NE (2d) 880, *Missouri* v. *Sharp,* 533 SW (2d) 601, *Vermont* v. *Bliss,* 340 A (2d) 76, *State ex rel Ringer* v. *Boles,* 157 SE 554, *California* v. *Elliott,* 6 Cal Rep. 753 and *California* v. *Ames,* 52 Cal. App. (3d) 389. These State Court cases all illustrate that where misinformation is given and where such information importantly affects defendant's decision to waive a jury, such a jury waiver is invalid since it does affect the knowing, intelligent and voluntary waiver of a jury.

Petitioner concludes by stating that the Courts below had departed drastically from the principals announced by this Court by holding in effect the legal advice given by counsel in the Court at the time of the jury waiver must be absolutely accurate. This was not the holding. The holding was merely that the advice given at this time was erroneous, that it did affect the jury waiver under the circumstances of this case so as to make it not a knowing,

intelligent and voluntary waive and for this reason they granted Respondent a new trial.

II.

Neither the Court of Appeals nor the Supreme Court of Ohio found any invited error nor did they find that the judge's statement of law arose the suggestion of the defense counsel.

Petitioner argues that the Courts failed to consider the fact that the advice was a reasonably competent interpretation of the law at the time of the waiver. However, both Courts did consider this, noted it and still said that that fact did not make a difference in whether or not there was an intelligent and voluntary jury waiver.

Petitioner states that the error was invited, however it is also without dispute as it appears on the record the Prosecuting Attorney was present in an open court when the advice was given the defendant on his jury waiver and the prosecuting attorney made no statement and did not object. Again at the pre-trial conference on June 16, 1975 the Prosecuting Attorney was again present and never raised the issue and made no objection nor sought any clarification. This was no invited error and neither court found that it was invited error.

Indeed it is clear that what was sought was merely an interpretation of the law before the presiding judge before the defendant waived his right to a jury. Under Ohio Criminal Rule 23 the defendant is entitled to know the exact nature of the right he is waiving which in this case Judge Cramer did.

Therefore, the decision of the First District Court of Appeals and the Supreme Court of Ohio finding the jury waiver not to be knowing, intelligent and voluntary was correct.

CONCLUSION

For the reasons stated above it is respectfully requested that the Writ of Certiorari be denied to review the judgment of the Supreme Court of Ohio.

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